

6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 52

[EPA-HQ-OAR-2009-0021; FRL-]

**Stay of Clean Air Interstate Rule for Minnesota; Stay of Federal
Implementation Plan to Reduce Interstate Transport of Fine
Particulate Matter and Ozone for Minnesota**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to stay the effectiveness, in the State of Minnesota only, of two final rules issued under section 110 of the Clean Air Act (CAA) related to the interstate transport of pollutants. On May 12, 2005, EPA issued the Clean Air Interstate Rule (CAIR). In CAIR, EPA required Minnesota and other states to submit State Implementation Plan (SIP) revisions to limit nitrogen oxides (NO_x) and sulfur dioxide (SO₂) emissions for the purpose of reducing the contributions these emissions make to particulate matter and ozone transport across state boundaries in the eastern half of the U.S. On April 28, 2006, EPA published Federal Implementation Plans (CAIR FIPs) containing requirements to serve as a backstop until replaced by an approved SIP.

Subsequently, the U.S. Court of Appeals for the D.C. Circuit held that EPA had not properly addressed possible errors

in the analysis supporting EPA's decision that Minnesota should be included in the CAIR region for fine particulate matter (PM_{2.5}). EPA is proposing to stay the effectiveness of CAIR and the CAIR FIP with respect to sources in Minnesota only, while EPA conducts a notice-and-comment rulemaking addressing this issue and its impact on the inclusion of Minnesota in CAIR.

DATES: Comments must be received on or before **[INSERT 30 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER]**. If anyone contacts us requesting a public hearing by **[INSERT 10 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, we will hold a public hearing approximately 30 days after publication in the Federal Register. Additional information about the hearing would be published in a subsequent Federal Register notice.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2009-0021, by one of the following methods:

- www.regulations.gov. Follow the on-line instructions for submitting comments.
- Email: a-and-r-docket@epa.gov. Attention Docket ID No. EPA-HQ-OAR-2009-0021.
- Fax: (202) 566-9744. Attention Docket ID No. EPA-HQ-OAR-2009-0021 .
- Mail: EPA Docket Center, EPA West (Air Docket), Attention Docket ID No. EPA-HQ-OAR-2009-0021, Environmental

Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW, Washington, DC 20460.

- Hand Delivery: EPA Docket Center (Air Docket), Attention Docket ID No. EPA-HQ-OAR-2009-0021, Environmental Protection Agency, 1301 Constitution Avenue, NW, Room 3334; Washington, D.C. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-HQ-OAR-2009-0021. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or e-mail. The www.regulations.gov Website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov, your e-mail address will be automatically captured and included as part of the comment that

is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters and any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

Docket: All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the EPA Docket Center EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the EPA Docket Center is (202) 566-1742.

FOR FURTHER INFORMATION CONTACT: Tim Smith, Air Quality Planning Division, Office of Air Quality Planning and Standards, Mail Code C539-04, Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: 919-541-4718; fax number: 919-541-0824; email address: smith.tim@epa.gov.

To request a public hearing, please contact Pam Long, Air Quality Planning Division, Office of Air Quality Planning and Standards, Mail Code C504-03, Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: at 919-541-0641; fax number 919-541-5509 no later than **[INSERT 10 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]** to request a hearing.

SUPPLEMENTARY INFORMATION:

Outline

- I. Background
- II. What is the Scope of this Proposal?
- III. Statutory and Executive Order Reviews
 - A. Executive Order 12866: Regulatory Planning and Review
 - B. Paperwork Reduction Act
 - C. Regulatory Flexibility Act (RFA)
 - D. Unfunded Mandates Reform Act
 - E. Executive Order 13132: Federalism
 - F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments
 - G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks
 - H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use
 - I. National Technology Transfer Advancement Act
 - J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

I. Background:

On May 12, 2005, EPA issued the CAIR. (70 FR 25162; May 12, 2005). In this rule, EPA found that 28 states and D.C. contribute significantly to nonattainment of the national ambient air quality standards (NAAQS) for fine particles and/or ozone in downwind states. The CAIR rule required these upwind sStates to revise their SIPs to include control measures to reduce emissions of SO₂ and/or NO_x. One of the states included in the CAIR region for fine particles was the State of Minnesota. Minnesota was thus required to reduce annual SO₂ and annual NO_x emissions in accordance with the requirements of the rule. Minnesota was not included in the CAIR ozone region.

On April 28, 2006, EPA issued the CAIR FIP rule. (71 FR 25330; April 28 2006). In this rule, EPA promulgated FIPs to implement the emission reduction requirements of the CAIR in all states covered by CAIR. The Agency issued the FIP requirements to provide a federal backstop for CAIR during the time period necessary for states to develop SIPs. EPA decided to adopt, as the FIP for each state in the CAIR region (including Minnesota), the SIP model trading programs in the final CAIR, modified slightly to allow for federal instead of state implementation.

A number of petitioners brought legal challenges to various aspects of the CAIR, and of the CAIR FIP rule, in the U.S. Court of Appeals for the D.C. Circuit. Among the parties challenging

the rule was Minnesota Power, an electric utility operating in Minnesota, who argued that EPA erred in including the State of Minnesota in the CAIR region for PM_{2.5}. On July 11, 2008, in North Carolina v. EPA, 531 F.3d 896, 926-30 (D.C. Cir. 2008), the Court ruled on these challenges. The Court granted Minnesota Power's petition because it concluded that EPA had failed to fully address alleged errors in its analysis for the State of Minnesota. The Court also noted that in EPA's CAIR analysis, Minnesota's contribution to PM_{2.5} was 0.20 µg/m³, the exact minimum level for inclusion.

On September 24, 2008, EPA filed a petition for rehearing with the D.C. Circuit. This petition sought rehearing of a number of the Court's findings, but did not seek rehearing of the findings regarding Minnesota. On October 31, 2008, EPA sent a letter to Minnesota Power indicating its intent to stay the effectiveness of CAIR with respect to sources located in the State of Minnesota. This letter was also submitted to the Court during briefing on the petitions for rehearing.

On December 23, 2008, the D.C. Circuit granted EPA's petition for rehearing only to the extent it remanded the case without vacatur. This decision will allow CAIR to remain in effect until EPA develops a replacement rule consistent with the July 11, 2008 opinion.

II. What is the Scope of this Proposal?

EPA intends to conduct further rulemaking[s] in response to the DC Circuit Court's remand of the CAIR rule. As part of that process, the Agency will evaluate the claimed errors in its contribution analysis for the State of Minnesota, and will provide notice-and-comment opportunity to the general public on our evaluation. Accordingly, in this action, EPA is proposing to stay the effectiveness of CAIR and the CAIR FIP with respect to the State of Minnesota and sources in the State of Minnesota only, during the pendency of the notice-and-comment rulemaking proceedings that will address whether Minnesota should be included in the CAIR region for PM_{2.5}.

EPA notes that allocations of CAIR NO_x allowances for existing Minnesota sources for 2009 have already been recorded in the allowance tracking system under the annual NO_x trading program in the CAIR FIP. EPA believes that, if the effectiveness of CAIR and the CAIR FIP were stayed as proposed with respect to Minnesota and sources in Minnesota, then all allowance allocations already recorded for Minnesota sources in order to implement the CAIR FIP should be removed from the annual NO_x trading program.

Under the proposed stay, Minnesota sources would not need to use their recorded allowance allocations to authorize their annual NO_x emissions. Unless these allowances were removed from

the trading program, the full amount of these allowances could be traded for use by non-Minnesota sources to authorize their own annual NO_x emissions. This would increase the total amount of allowances available for use by sources in the states that, under the proposed stay, would continue to be subject to CAIR and/or the CAIR FIP (i.e., the CAIR region except Minnesota). As a result, the total amount of allowances available for sources in these states would exceed the sum of the annual NO_x trading budgets under CAIR and the CAIR FIP for these states.

In order to preserve, under the proposed stay, the annual NO_x emission reductions that were intended to be achieved under CAIR and the CAIR FIP and were reflected in the state annual NO_x trading budgets under those rules, EPA proposes to require each Minnesota source with recorded allowance allocations under the annual NO_x trading program to hold an amount of allowances issued for the same year as the recorded allowances (e.g., 2009) equal to the amount of the recorded allocations. EPA also proposes that the Administrator deduct, and thereby retire, these required allowance holdings and that no additional allowance allocations from the state annual NO_x trading budget for Minnesota be recorded.

EPA understands that at least one Minnesota source has traded some of its recorded allowance allocations. However, EPA believes that the most reasonable approach for removing

Minnesota sources' recorded allowance allocations from the trading program is to require these sources to provide to the Administrator for deduction the allowances that must be removed. Each Minnesota source would accomplish this by continuing to hold allocated allowances and, to the extent necessary to replace allocated allowances that it traded, obtaining other allowances issued for the same year as its traded allowances. Because all CAIR NO_x allowances issued for a given year (e.g., 2009) under the annual NO_x trading program in CAIR and the CAIR FIP are fungible, deduction of the proper amount of CAIR NO_x allowances issued for that year has the desired effect whether the deducted allowances are Minnesota sources' originally allocated allowances or allowances that were obtained from other sources. EPA believes that a deadline of June 30, 2009 for Minnesota sources to hold the required allowances for deduction would provide sufficient time for Minnesota sources to obtain the proper amount of CAIR NO_x allowances. While EPA's preference is to remove these allowances from the trading program as quickly as possible, the Agency will consider a later deadline if public comments indicate that an earlier deadline places an unreasonable burden on Minnesota sources who must re-acquire traded allowances.

III. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

This action is not a "significant regulatory action" under the terms of Executive Order (EO) 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the EO.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. Burden is defined at 5 CFR 1320(b). This action does not impose any new obligations or enforceable duties on any state, local or tribal governments or the private sector. Therefore, it does not impose an information collection burden.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this rule on small entities, small entity is defined as: (1) a small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or

special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This proposed rule will not impose any requirements on small entities.

We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (URMA), 2 U.S.C. 1531-1538 for state, local, or tribal governments or the private sector. This action imposes no enforceable duty on any state local or tribal governments or the private sector. This action simply does not impose any new obligations or enforceable duties on any state, local or tribal governments or the private sector. Therefore, this action is not subject to the requirements of sections 202 and 205 of the UMRA.

This action is also not subject to the requirements of section 203 of URMA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This action does not impose any new obligations or enforceable duties on any small governments.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the states, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This rule does not impose any new obligations or enforceable duties on any state, local or tribal governments or

the private sector. Thus, Executive Order 13132 does not apply to this rule.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and state and local governments, EPA specifically solicits comment on this proposed rule from state and local officials.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have Tribal implications as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). It will not have substantial direct effects on Tribal governments, on the relationship between the Federal government and Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian Tribes, as specified in Executive Order 13175. This action does not significantly or uniquely affect the communities of Indian Tribal governments. As discussed above, this action imposes no new requirements that would impose compliance burdens. Thus, Executive Order 13175 does not apply to this action.

EPA specifically solicits additional comment on this proposed action from Tribal officials.

G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5-501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it imposes no new requirements.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law No. 104-113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

J. Executive Order 12898 - Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minorities and low-income populations in the United States.

The EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it not impose any regulatory requirements.

**Page 17 of 21 - Stay of Clean Air Interstate Rule for Minnesota;
Stay of Federal Implementation Plan to Reduce Interstate
Transport of Fine Particulate Matter and Ozone for Minnesota**

List of Subjects

40 CFR Part 51

Administrative practice and procedure, Air pollution control,
Environmental protection, Intergovernmental relations, Nitrogen
oxides, Ozone, Particulate matter, Reporting and record keeping
requirements, Sulfur dioxide.

40 CFR Part 52

Administrative practice and procedure, Air pollution control,
Environmental protection, Intergovernmental relations, Nitrogen
oxides, Ozone, Particulate matter, Reporting and record keeping
requirements, Sulfur dioxide.

Dated:

Steven L. Johnson,
Administrator.

For the reasons set forth in the preamble, parts 51 and 52 of chapter I of title 40 of the Code of Federal Regulations are proposed to be amended as follows:

PART 51—[AMENDED]

1. The authority citation for part 51 continues to read as follows:

Authority: 23 U.S.C. 101; 42 U.S.C. 7401-7671q.

2. Section 51.123 is amended by adding a new paragraph (a)(3) as follows:

§ 51.123 [Amended]

(a)(1) * * *

(3) Notwithstanding the other provisions of this section, the effectiveness of such provisions as they relate to the State of Minnesota is stayed as of [the effective date of the final rule].

* * * * *

3. Section 51.124 is amended by:

a. Redesignating paragraph (a) as paragraph (a)(1);
and

b. Adding a new paragraph (a)(2) as follows:

§ 51.124 [Amended]

(a)(1) * * *

(2) Notwithstanding the other provisions of this section, the effectiveness of such provisions as they

relate to the State of Minnesota is stayed as of [the effective date of the final rule].

* * * * *

4. Section 51.125 is amended by adding a new paragraph (a)(3) as follows:

§ 51.125 [Amended]

(a)(1) * * *

(3) Notwithstanding the other provisions of this section, the effectiveness of such provisions as they relate to the State of Minnesota is stayed as of [the effective date of the final rule].

* * * * *

PART 52—[AMENDED]

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401, et seq.

2. Section 52.35 is amended by adding a new paragraph (e) as follows:

§ 52.35 [Amended]

(a) * * *

(e) Notwithstanding paragraphs (a) and (b) of this section, the effectiveness of such paragraph as it relates to sources in the State of Minnesota is stayed as of [the effective date of the final rule], except as provided in §52.1240(b)(1).

3. Section 52.36 is amended by adding a new paragraph (d) as follows:

§ 52.36 [Amended]

(a) * * *

(d) Notwithstanding paragraph (a) of this section, the effectiveness such paragraph as it relates to sources in the State of Minnesota is stayed as of [the effective date of the final rule].

4. Section 52.1240 is amended by adding a new paragraph (b) as follows:

§ 52.1240 [Amended]

(a) * * *

(b) Notwithstanding paragraph (a) of this section,

(1) The effectiveness such paragraph as it relates to sources in the State of Minnesota is stayed as of [the effective date of the final rule], except that the owner and operator of each such source in whose compliance account any allocation of CAIR NO_x allowances was recorded under the Federal CAIR NO_x Annual Trading Program in part 97 of this chapter shall hold in that compliance account, as of June 30, 2009 and with regard to each such recorded allocation, CAIR NO_x allowances that are usable in such trading program, issued for the same year as the recorded allocation, and in the same amount as the recorded allocation. The owner and operator shall hold such allowances

for the purpose of deduction by the Administrator under paragraph (b)(2) of this section;

(2) After June 30, 2009, the Administrator will deduct from the compliance account of each source in the State of Minnesota any CAIR NO_x allowances required to be held in that compliance account under paragraph (b)(1) of this section.

(3) Starting no later than [the effective date of the final rule], the Administrator will not record any allocation of CAIR NO_x allowances in the State trading budget for Minnesota for any year.

5. Section 52.1241 is amended by:

a. Redesignating the introductory text as paragraph (a); and

b. Adding a new paragraph (b) as follows:

§ 52.1241 [Amended]

(a) * * *

(b) Notwithstanding paragraph (a) of this section, the effectiveness such paragraph as it relates to sources in the State of Minnesota is stayed as of [the effective date of the final rule].